No. 03-737 (4)

Supreme Court, U.S.
FILED
MAR 1 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MAJOR GENERAL HAROLD A. CROSS, in his official capacities as the Adjutant General of the State of Mississippi, of the Mississippi Militia, of the Mississippi National Guard, and as Executive Head of the Mississippi Military Department and the Mississippi Militia, the Mississippi National Guard and the Mississippi Military Department,

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, in her official capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region and LINDA J. NORWOOD, in her former official capacity as Acting Regional Director of the Federal Labor Relations Authority, Atlanta Region,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF TO RESPONDENTS' OPPOSITION

EMERSON BARNEY ROBINSON III *
JEFFREY A. WALKER
BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
Post Office Box 22567
Jackson, Mississippi 39225-2567
(601) 948-5711

PAUL ROGER GOOGE, JR.
Special Assistant Attorney General
MISSISSIPPI ATTORNEY GENERAL'S OFFICE
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3824

Counsel for Petitioners

* Counsel of Record

March 1, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 03-737

MAJOR GENERAL HAROLD A. CROSS, in his official capacities as the Adjutant General of the State of Mississippi, of the Mississippi Militia, of the Mississippi National Guard, and as Executive Head of the Mississippi Military Department and the Mississippi Militia, the Mississippi National Guard and the Mississippi Military Department,

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, in her official capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region and LINDA J. NORWOOD, in her former official capacity as Acting Regional Director of the Federal Labor Relations Authority, Atlanta Region,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF TO RESPONDENTS' OPPOSITION

REPLY ARGUMENT

1. Respondents cleverly misfocus their argument on the status of Military Technicians,[1] rather than the status of the

[1] Respondents repeatedly argue that this case involves "civilian" employees. *E.g.*, Opp. at 6 n.1. However, the undisputed proof in the record establishes that Military Technicians: maintain and operate military weapons systems and equipment; fly military aircraft; handle ordinance and other explosives; run live fire ranges; and perform other duties

Mississippi Guard and its Adjutant General. However, the dispositive issue in this case is not the status of Military Technicians. Rather, the issue is whether the FLRA—a federal instrumentality—has the statutory and constitutional authority to issue coercive orders and sanctions against these state military actors when they are in a state command status. It is ironic indeed that the FLRA would contend it has such power, when the President himself does not.

In order to support their contention, Respondents suggest that while a state Adjutant General is a state officer, that fact does not prevent him from *simultaneously* holding the capacity of a federal executive agency. In order to reach this conclusion, Respondents intentionally ignore *Perpich v. DOD*, 496 U.S. 334 (1990), which plainly held that Guardsmen "[n]ow must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—*only one of which is worn at any particular time.*" *Id.* at 348 (emphasis added). Respondents utterly fail to explain how a state Guard and its Adjutant General can *simultaneously* hold a state and federal capacity, consistent with *Perpich*.

2. Respondents' Opposition is as telling for what it does not say, as for what it does. For example, it is well established that, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)(quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Yet in their discussion of the dispositive statutory construction issue - whether 5 U.S.C. § 7103(a)(3) and 5 CFR § 2421.4 render the Adjutant General and the Mississippi Guard "[a]n Executive

---

indisputably military in nature. App. I, 103a-104a. In light of these facts, to characterize Military Technicians as "civilians" is inaccurate.

agency" or "[a]ctivity" of an "[a]n Executive agency"—Respondents make no mention of this Plain Statement Rule of statutory and constitutional law.

Likewise, Respondents make no attempt to explain how the Fifth Circuit's admission that "[t]he broad and somewhat circular terms of the statutory definitions of agency and Executive agency are *non-dispositive* in resolving the specific question that this appeal presents" 12a-13a n. 6 (emphasis added), can possibly comply with the Plain Statement Rule. Rather than fall into the "nondispositive" statutory "thicket" conceded by the Fifth Circuit *Id.* & 9a, Respondents attempt to jump over it, by misfocusing on the Technicians Act, rather than 5 U.S.C. § 7103(a)(3) and 5 CFR § 2421.4—which are the provisions at issue here.

3. In that regard, Respondents place great emphasis on 32 U.S.C. § 709(e). Yet that statute does not designate Petitioners as a federal executive agency, and further is not even part of the FSLMRA, which is the Act at issue here. Additionally, there is a significant difference between section 709's statutory *retention* of previously existing state authority over these formerly state personnel (caretakers and clerks), with the FLRA's dragooning of these state actors to involuntarily participate in a collective bargaining scheme. *See NeSmith v. Fulton*, 615 F.2d 196, 200 (5th Cir. 1980) (emphasis added) (citation omitted) ("[t]he legislative history of the National Guard Technicians Act explicitly states that the Act provides for the exercise of the adjutant general's administrative authority over the technician program to *remain* 'as a matter of law . . . at the State level'").

Further, section 709 contains no mention of unions or the FLRA, thus undermining Respondents' Tenth Amendment argument. In any event, Respondents fail to acknowledge that section 709 was enacted pursuant to Congress' Article I Second Militia Clause authority. This is important, as under

Kimel v. Florida Board of Regents, 528 U.S. 62, 78 (2000), Congress lacks any authority under its Article I powers to pierce a state actor's sovereign immunity.

4. Respondents seek to circumvent *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) with three arguments. First, they contend that FLRA proceedings are brought by the Federal Government, and therefore do not fall within Eleventh Amendment proscriptions. Yet *South Carolina* rejected this very argument, finding that such a procedure "[d]oes not retroactively convert a [federal administrative] adjudication initiated and pursued by a private party into one initiated and pursued by the Federal Government." *Id.* at 764.

Apparently realizing that argument will not succeed, Respondents then contend that FLRA proceedings are not sufficiently adversarial to fall within the proscriptions of *South Carolina*. Even overlooking the fact that such proceedings very well could lead to stigmatizing unfair labor practices charges and orders, such an argument is contrary to *South Carolina*, which held that, "[t]he primary purpose of sovereign immunity is not to protect state treasuries, . . . but to afford the States the dignity and respect due sovereign entities. As a result, . . .' the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *South Carolina*, 535 U.S. at 765-66 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996)).

5. In sum, Petitioners respectfully submit that the Fifth Circuit's decision below threatens to warp the carefully crafted Congressional and constitutional scheme delineating the respective spheres of state versus federal military power. As evidenced by *Perpich*, it is very important—as a matter of Federalism and constitutional law, as well as the inter-

workings of the Guard and the Active Components—that the distinctions of authority and jurisdiction between the federal military and each state's militia be maintained.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

EMERSON BARNEY ROBINSON III *
JEFFREY A. WALKER
BUTLER, SNOW, O'MARA, STEVENS
& CANNADA, PLLC
Post Office Box 22567
Jackson, Mississippi 39225-2567
(601) 948-5711

PAUL ROGER GOOGE, JR.
Special Assistant Attorney General
MISSISSIPPI ATTORNEY GENERAL'S OFFICE
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3824

Counsel for Petitioners

March 1, 2004

* Counsel of Record